

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 42
5322923

BETWEEN

TONY HANKS
Applicant

A N D

CHOCOLATE THERAPY
LIMITED
First Respondent
AND
THE SIMPSONS 2010
LIMITED
Second Respondent

Member of Authority: P R Stapp

Representatives: Nikkii Flint Counsel for the Applicant
Murray Langham for Chocolate Therapy Limited
No appearance for The Simpsons 2010 Limited

Investigation Meeting: 11 April 2012 at Wellington

Date of Determination: 12 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The employment relationship problem is about the non payment of \$700 on account to Mr Tony Hanks in terms of a signed and agreed settlement recorded in a record of settlement by a Mediator from the Department of Labour (1 June 2011). Mr Hanks is also seeking a penalty for non compliance and full solicitor client costs.

[2] Chocolate Therapy Limited has claimed it has nothing to do with this matter. The first time Mr Murray Langham, director of Chocolate Therapy Limited, learned of the matter was when the statement of problem was served. He had previously been a co-director, but bought the business in July 2011. The Simpsons 2010 Limited appears to accept that the \$700 has not been paid.

The issues

[3] This is a matter for compliance under s.137 of the Employment Relations Act 2000 (the Act). Who is required to pay the outstanding\$700?

[4] A penalty has been sought under ss.133 and 135 of the Act and in particular pursuant to s.149 (4) of the Act. Is this a matter for a penalty for breaching a record of settlement? Who should the penalty, if any, be imposed against?

Failure of The Simpsons 2010 Limited to attend

[5] No good cause has been provided for the failure of The Simpsons 2010 Limited to be represented at the Authority's investigation meeting. The meeting was delayed to enable a support officer to telephone Mr Roger Simpson, a director, and to try and contact him. The telephone call was unsuccessful because it was engaged. An email was also sent to Mr Simpson. At the time I decided to continue as if that party had duly attended or been represented. After the investigation meeting had concluded an email was received from Mr Simpson that he had sent in a medical certificate. At the time this had not been received. Since then I have received a medical certificate dated 5 April 2012 that Mr Simpson was not well enough to attend due to several health reasons. The receipt of the certificate was too late. Also, I note that Mr Simpson has been dealing with the Authority by email and his last email before the investigation meeting was dated 20 March 2012, which prompted correctly and properly a response from the support officer suggesting to Mr Simpson any adjournment and/or rescheduling of the investigation meeting would need to be in writing with supporting documentation. Nothing was provided until the date of the investigation meeting. Indeed no advance notice by email was provided that he had sent his medical certificate until it was too late. The Simpsons 2010 Limited will have to now rely on procedures open to it in the event of any disagreement in regard to this determination.

[6] Mr Simpson in his written replies made various claims against the applicant, some of which were of a monetary nature. These have not been dealt with because there was no appearance for The Simpsons 2010 Limited and no application made for them to be dealt with concurrently with the applicant's statement of problem. They would need a separate application.

The facts

[7] Mr Hanks attended mediation with the assistance of the Department of Labour on 25 November 2010.

[8] Prior to the matter progressing to a hearing of the Employment Relations Authority, the parties involved in the employment relationship problem were successful in reaching a settlement outside of the mediation process. That settlement was signed off by a Mediator at the Department Labour in a record of settlement on 1 June 2011. There are three parties to the record of settlement. First, the applicant, second, Chocolate Therapy Limited, and third, The Simpsons 2010 Limited. Mr Roger Simpson signed on behalf of Chocolate Therapy Limited (since he was a director of the said company at the time) and Messrs Edward and Roger Simpson signed the record of settlement on behalf of The Simpsons 2010 Limited. Both parties are bound by that settlement.

[9] Clause 1 of the record of settlement provided for a sum to be paid. Although there was confidentiality agreed the right to enforce the record of settlement waives the confidentiality. The clause reads as follows:

(1) The Simpsons 2010 Limited will pay Tony the sum of \$2,000 (two thousand dollars) in terms of section 123(1)(c)(i) of the Employment Relations Act 2000. This amount will be paid in weekly instalments: the first instalment being \$200 and subsequent instalments being at the rate of \$100 per week (recognising that to total \$2,000). The first instalment is due within 7 days of this document being signed by the Mediator from the Department of Labour.

[10] A total of \$1,300 of the record of settlement sum was paid, but all other sums for payment have since ceased.

[11] It is common ground that \$700 remains outstanding against the settlement sum.

[12] The applicant has made attempts for payments to be made (15 September 2011 in a letter).

[13] The applicant reasonably expected that the payment would be made upon the business being sold and that full payment of the remaining settlement sum would be paid upon the sale of the business (21 September 2011 letter).

[14] When payment did not eventuate the applicant followed the matter up again by telephone and The Simpsons 2010 Limited's solicitor advised the applicant to be patient (4 October 2011).

[15] Six months has now passed since the date of the final instalment being due.

Compliance

[16] It is common ground that \$700 is still due and owing. It is clear from the record of settlement that that money is due and owed by The Simpsons 2010 Limited. The Chocolate Therapy Limited has nothing to do with the current application for enforcement, and indeed its director knew nothing about the matter until the statement of problem for compliance was served. Because Chocolate Therapy Limited was a party to the Record of Settlement it was cited by the applicant. That was a reasonable approach. However, Chocolate Therapy Limited is therefore absolved from any compliance on the payment clause, and has no involvement with the payments in terms of the relevant clause of the record of settlement.

Penalty

[17] It is clear the failure to pay under the instalment plan by The Simpsons 2010 Limited is in breach of s.149 (4) of the Act. The terms of settlement were agreed between the parties (signed off by the then director Roger Simpson) and the record of settlement was properly executed by a Mediator from the Department of Labour in accordance with s.149 of the Act.

[18] I am satisfied that with the attempts made by the applicant to get the payment made, that The Simpsons 2010 Limited has wilfully breached the terms of the record of settlement by not making the required payment. There has been no adequate explanation or an attempt to resolve the situation.

[19] The final payment was due by 12 October 2011 and the applicant has been denied the use of his money by The Simpsons 2010 Limited.

Conclusion

[20] I order under s.137 (2) of the Employment Relations Act 2000 that The Simpsons 2010 Limited pay Tony Hanks the sum of \$700 (seven hundred dollars) in accordance with the record of settlement. Under s 137 (3) of the Employment

Relations Act a date for compliance is required to be provided. I require this payment to be made by 24 April 2012. I have not exercised my discretion to order the payment to be made by instalments (s 138 (4A) of the Act) because The Simpsons 2010 Limited has had the benefit of the full use of that money since October 2011 (when the final payment was due) and there is no evidence of any inability to pay.

[21] In addition, I order a penalty be imposed on The Simpsons 2010 Limited pursuant to ss.133 and 135 of the Employment Relations Act 2000, for a breach of the terms of the record of settlement (applying s.149 of the Act). I am satisfied that the requirements under s 135 have been met for a penalty and that the claim for a penalty has been made within 12 months of the Simpsons 2010 Limited failing to pay as required (amended SOP 27 February 2012). The penalty sum is \$2,000 to be paid to the Crown as a matter of public policy.

[22] As requested by Ms Flint, I reserve the question of costs for memoranda to follow.

[23] It should be noted that although costs are usually made on a notional tariff (which is \$3,500) per day, the applicant is requesting the full payment of solicitor/client costs. This will involve me considering a movement on the usual daily tariff.

Orders of the Authority

[24] The Simpsons 2010 Limited is to pay to Tony Hanks the sum of \$700 by 24 April 2012.

[25] The Simpsons 2010 Limited is to pay \$2,000 penalty to the Crown.

[26] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority